

[50 CFR Part 17]

ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Proposed Determination of Critical Habitat for the Palila

The Director, United States Fish and Wildlife Service (hereinafter, the Director and the Service, respectively) hereby issues a Proposed Rulemaking which would determine Critical Habitat for the Palila (*Psittirostra bailewii*), an Endangered Hawaiian bird. This Proposal is issued pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884; hereinafter the Act).

BACKGROUND

The Palila, a small bird of the Hawaiian Honeycreeper Family, is now restricted to a relatively small area on the Island of Hawaii, and has been officially listed as Endangered since 1967. Hope for the survival and recovery of this species centers on maintenance of its forest habitat on the slopes of Mauna Kea.

A notice of intent to determine Critical Habitat for the Palila was published by the Service in the FEDERAL REGISTER of May 16, 1975 (40 FR 21499-21500). Subsequently, the Director received several comments indicating that Critical Habitat for the Palila consisted of the Mamane-Nalo Forests around Mauna Kea. On June 18, 1976, the Service's Region 1 in Portland submitted a precise delineation of a recommended Critical Habitat zone in this area. After evaluating this recommendation and supporting data, the Director determined to proceed with this Proposed Rulemaking.

The area delineated below consists primarily of Mamane (*Sophora chrysophylla*)-Nalo (*Myoporum sandwicense*) forest, and extends from about

10,000 to 10,000 feet in elevation. The Palila depends on the Mamane and Nalo trees for food, shelter, and nesting sites; it cannot survive without these tree species. Moreover, the delineated area apparently contains the world's entire known population of Palila, and supports most of the large and intermediate-sized Mamane and Nalo trees on Mauna Kea. This area is large enough to allow space for the population to expand, and includes a full range of altitudinal and geographical sites needed by the Palila for normal life cycle movement. Such movement is the response of the species to shifting seasonal and annual patterns of flowering, seed set, and ensuing pod development of the Mamane vegetation.

EFFECTS OF THE RULEMAKING

The effects of this determination are involved primarily with Section 7 of the Act, which states:

"The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical."

An interpretation of the term "Critical Habitat" was published by the Fish and Wildlife Service and the National Marine Fisheries Service in the *FEDERAL REGISTER* of April 22, 1975 (40 FR 17764-17765). Some of the major points of that interpretation are: (1) Critical Habitat could be the entire habitat of a species, or any portion thereof, if any constituent element is necessary to the normal needs or survival of that species; (2) Actions by a Federal agency affecting Critical Habitat of a species would not conform with section 7 if such actions might be expected to result in a reduction in the numbers or distribution of that species of sufficient magnitude to place the species in further jeopardy, or restrict the potential and reasonable recovery of that species; and (3) There may be many kinds of actions which can be carried out within the Critical Habitat of a species which would not be expected to adversely affect that species.

This last point has not been well understood by some persons. There has been widespread and erroneous belief that a Critical Habitat designation is something akin to establishment of a wilderness area or wildlife refuge, and automatically closes an area to most human uses. Actually, a Critical Habitat designation applies only to Federal agencies, and essentially is an official notification to these agencies that their responsibilities pursuant to Section 7 of the Act are applicable in a certain area.

A Critical Habitat designation must be based solely on biological factors. There may be questions of whether and how much habitat is critical, in accordance with the above interpretation, or how to best legally delineate this habitat, but any resultant designation must correspond with the best available biological data. It would not be in accordance with the law to involve other motives; for example, to enlarge a Critical Habitat delineation so as to cover additional habitat under Section 7 provisions, or to reduce a delineation so that actions in the omitted area would not be subject to evaluation.

There may indeed be legitimate questions of whether, and to what extent, certain kinds of actions would adversely affect listed species. These questions, however, are not relevant to the biological basis of Critical Habitat delineations. Such questions should, and can more conveniently, be dealt with after Critical Habitat has been designated. In this respect, the Service in cooperation with other Federal agencies has drawn up a set of guidelines which, in part, establish a consultation and assistance process for helping to evaluate the possible effects of actions on Critical Habitat.

REORGANIZATION OF REGULATIONS

It is also proposed in this rulemaking to reorganize the location of the present list of Critical Habitat designations. Presently, each Critical Habitat final rulemaking is assigned a separate section number in Subpart F of Part 17. Starting with the Critical Habitat designation for the snail darter at § 17.61, sequential numbers have been assigned for the Critical Habitats of the American crocodile (§ 17.62), the California condor (§ 17.63), the Indiana bat (§ 17.65) and the Florida manatee (§ 17.66). This procedural method is inefficient because of the rapid consumption of available section numbers in Subpart F. It is therefore proposed that the present Subpart F, "Critical Habitat" be deleted, and a new Subpart I, "Interagency Cooperation," be added. Within the new Subpart I, it is proposed that all Critical Habitat designations for fish or wildlife be listed under § 17.95. It is anticipated that §§ 17.90 through 17.94 will eventually be used to set forth the procedural regulations implementing Section 7 of the Endangered Species Act of 1973. The following sequence would be utilized in § 17.95: § 17.95(a)—mammals; § 17.95(b)—birds; § 17.95(c)—reptiles; § 17.95(d)—amphibians (Reserved); § 17.95(e)—fishes; § 17.95(f)—clams (Reserved); § 17.95(g)—snails (Reserved); § 17.95(h)—crustacea (Reserved); § 17.95(i)—insects (Reserved); § 17.95(j)—other (Reserved). Critical Habitat designations for plants would be located at § 17.96.

PUBLIC COMMENTS SOLICITED

The Director intends that the rules finally adopted be as accurate as possible in delineating the Critical Habitat of the Palila. The Director, therefore, desires to obtain the comments and suggestions of the public, other concerned govern-

mental agencies, the scientific community, or any other interested party on the Proposed Rules.

Final promulgation of Critical Habitat regulations will take into consideration the comments received by the Director. Such comments and any additional information received may lead the Director to adopt final regulations that differ from this Proposal.

SUBMITTAL OF WRITTEN COMMENTS

Interested persons may participate in this Rulemaking by submitting written comments, preferably in triplicate, to the Director (FWS/LE), U.S. Fish and Wildlife Service, P.O. Box 15123, Washington, D.C. 20036. All relevant comments received no later than April 18, 1977, will be considered. The Service will attempt to acknowledge receipt of comments, but substantive responses to individual comments may not be provided. Comments received will be available for public inspection during normal business hours at the Service's Office in Suite 600, 1612 R Street, NW., Washington, D.C.

Dated: December 12, 1976.

GEORGE W. MILAS,
Acting Director, Fish and
Wildlife Service.

Accordingly, it is hereby proposed to amend 50 CFR Part 17:

1. By deleting Subpart F of Part 17; by adding a new Table of Sections for Subpart I and by adding a new Subpart I of Part 17 to read as follows:

Subpart I—Interagency Cooperation
Sec.
17.90—17.94 [Reserved]
17.95 Critical habitat—fish and wildlife.
17.96 Critical habitat—plants. [Reserved]

AUTHORITY: Sec. 7, Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 834).

Subpart I—Interagency Cooperation
§ 17.90 [Reserved]
§ 17.91 [Reserved]
§ 17.92 [Reserved]
§ 17.93 [Reserved]
§ 17.94 [Reserved]
§ 17.95 Critical Habitat—Fish and Wildlife.

(a) *Mammals*—(1) *Florida Manatee*.
(i) The following areas (exclusive of those existing man-made structures or settlements which are not necessary to the normal needs or survival of the species) in Florida are critical habitat for the Florida manatee (*Trichechus manatus*): Crystal River and its headwaters known as King's Bay, Citrus County; the Little Manatee River downstream from the U.S. Highway 301 bridge, Hillsborough County; the Manatee River downstream from the Lake Manatee Dam, Manatee County; the Myakka River downstream from Myakka River State Park, Sarasota and Charlotte Counties; the Peace River downstream from the Florida State Highway 760 bridge, De Soto and Charlotte Counties; Charlotte Harbor north of the Charlotte-Lee county line, Charlotte County; Caloosahatchee River downstream from the Florida State Highway 31 bridge,

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ized, funded, or carried out by them do not result in the destruction or modification of this Critical Habitat area.

(c) *Reptiles* (1) *American Crocodile*. (i) The following area (exclusive of those existing man-made structures or settlements which are not necessary to the normal needs or survival of the species) is critical habitat for the American crocodile (*Crocodylus acutus*): All land and water within the following boundary in Florida: beginning at the easternmost tip of Turkey Point, Dade County, on the west of Escayne Bay; thence southward along a straight line to Christmast Point at the southernmost tip of Key West; thence southwestward along a line following the shores of the Atlantic Ocean side of Old Rhodes Key, Palo Alto

Key, Anglefish Key, Key Largo, Plantation Key, Windley Key, Upper Matecumbe Key, Lower Matecumbe Key, and Long Key, to the westernmost tip of Long Key; thence northwestward along a straight line to the westernmost tip of Middle Cape; thence northward along the shore of the Gulf of Mexico to the north side of the mouth of Little Sable Creek; thence eastward along a straight line to the northernmost point of Nine-Mile Pond; thence northeastward along a straight line to the point of beginning.

(ii) Pursuant to section 7 of the act, all Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area.

(d) [Reserved]

(e) *Fishes*—(1) *Snail Darter*. (i) The following area is critical habitat for the snail darter (*Percina (Imostoma) sp.*). From river mile 0.5 to river mile 17 of the Little Tennessee River, Loudon County, Tennessee, as shown on a map entitled "Tellico Project," prepared by Tennessee Valley Authority, Bureau of Water Control Planning, August 1965 (map 65-MS-453 K 501). (ii) Pursuant to section 7 of the Act, all Federal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area.

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